

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 27, 2009

IN RE C.T.B.

Appeal from the Chancery Court for Marshall County
No. 14687 J.B. Cox, Chancellor

No. M2009-00316-COA-R3-PT - Filed July 6, 2009

A father challenges the trial court's decision to terminate his parental rights. Because we disagree with the trial court's conclusion that the father's failure to support or visit was willful, we reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Jheri Beth Rich, Lewisburg, Tennessee, for the appellant, M.R.B., Jr.

Derek Colson Sanborn and Richard L. Dugger, Shelbyville, Tennessee, for the appellees, D.D.D. and D.D.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

C.T.B., a boy, was born in May 2004 to D.D.D. ("Mother") and M.R.B., Jr. ("Father"). C.T.B.'s parents were never married but lived together off and on until about February 2005. Mother began a relationship with D.D. in March 2005, and the two were married in May 2007.

On March 28, 2008, Mother and D.D. filed a petition to terminate Father's parental rights and to allow D.D. to adopt C.T.B.¹ The petition alleged that Father had abandoned the child in that he failed "without good cause or excuse" to seek reasonable visitation, to pay anything more than token child support, or to pay a reasonable share of the expenses related to the child's birth. Father's

¹ Mother does not have standing to file a petition for the termination of Father's parental rights because a biological parent does not appear on the exclusive list of persons and entities set out at Tenn. Code Ann. § 36-1-113(b) who can bring such an action. See *Osborn v. Marr*, 127 S.W.3d 737, 741 (Tenn. 2004).

last known address was listed as the Marshall County jail. On June 9, 2008, Mother and D.D. moved for a default judgment alleging that Father had been properly served on April 16, 2008, but had failed to respond in a timely manner. On June 18, 2008, the court found Father to be indigent and appointed counsel for him.

Although the record does not include an order appointing a guardian ad litem for C.T.B., it is apparent that the court did appoint a guardian ad litem because attorney William Haywood filed a guardian ad litem report on August 19, 2008. The report was based on interviews with C.T.B., Mother, and D.D. and stated that Mr. Haywood was unable to contact Father.

Father filed an answer to the termination petition on October 27, 2008, and denied the paragraphs in the petition relating to his alleged abandonment of C.T.B.

Mr. Haywood filed an amended guardian ad litem report on December 8, 2008, after interviewing Father. The report notes that Father “has recently been in Middle Tennessee Mental Health Institute and is currently taking the prescription medications Haldol, Cogetin [sic], and Trazadene.” Father was living with his mother and receiving disability benefits due to his mental condition. While recognizing Father’s desire to parent C.T.B. and his feelings for the child, the guardian ad litem reached the following conclusion:

I do believe it is in [C.T.B.’s] best interest to be fathered by [D.D.] as he has shown consistency in nurturing, instructing, participating with, and encouraging [C.T.B.] in every aspect of his life. [Father], at best, has been sporadic in [C.T.B.’s] life, and his mental health is suspect to affect [C.T.B.] over time.

Hearing

The case was tried on December 17, 2008. The guardian ad litem testified as a witness.² Mr. Haywood reiterated his conclusion that it was in C.T.B.’s best interest to be fathered by D.D.

Mother testified that Father had not had any contact with C.T.B. during the four-month period preceding the filing of the petition, November 28, 2007, through March 28, 2008. Father had not supplied any child support for C.T.B. during that period of time. Mother denied keeping the child’s paternal grandmother, D.B., or Father from having visits with the child. The maternal grandmother and D.D. also testified.

D.B. testified about her relationship with C.T.B. and about Father’s relationship with the child. After Mother and Father ceased living together, D.B. would come pick C.T.B. up at the home

²Father has not raised an issue regarding the role played by the guardian ad litem as a witness rather than as an attorney or advocate for the child. See *In re Adoption of T.L.H.*, No. M2008-01408-COA-R3-PT, 2009 WL 152475, *6 (Tenn. Ct. App. Jan. 21, 2009).

of his maternal grandmother³ and have visits with the child, sometimes for days at a time. According to D.B., Father lived with her until May 2007 and regularly saw C.T.B. when the child was at D.B.'s home. She kept a log of her contacts with the child.⁴ D.B.'s last visit with the child was on October 12, 2007. She testified that, after the October 2007 meeting, she tried to contact Mother to arrange visits with C.T.B. but was unable to reach her. D.B. stated that she went by Mother's house but no one would answer the door. D.B. testified that Father had been hospitalized from January 8 or 9, 2008, through September 2008 for mental health issues.

Father testified that, sometime prior to May 2007, he stopped taking the medications prescribed to control his mental symptoms and that he did not see C.T.B. after he moved out of D.B.'s house in May 2007. After Father stopped taking his medications, he got into legal trouble, moved to Chicago, and started using illegal drugs. He was eventually apprehended and returned to Tennessee to face pending charges. Father testified that he was receiving disability benefits⁵ and was staying on his medications at the time of trial.

Trial court's decision

At the conclusion of the proof, the trial court ordered that Father's parental rights be terminated. The court found that Father "neither residentially shared with the child nor has he financially supported the child, by his own choice, for a period far in excess of the time frame required in the statute."⁶ In finding grounds for termination based upon abandonment, the court further stated:

In May of 2007 the father left his mother's home and by his own volition, began a lifestyle of drug use. This lifestyle choice totally ignored his own mental condition [and] absolutely ignored the well being of the child. The culmination of that voluntary choice was a judicial hospitalization that lasted from January to September of this past year [2008]. These actions on the part of the father are willful actions, clearly and convincingly willful actions. Grounds clearly and convincingly exist.

The court went on to conclude that termination of Father's parental rights was in the best interest of C.T.B.

³ Mother was living with maternal grandmother during this period of time.

⁴ D.B. and Mother gave differing testimony as to how much time C.T.B. spent with his paternal grandmother after Mother and Father ended their relationship.

⁵ It appears that Father receives Supplemental Security Income (SSI) disability benefits.

⁶ Tenn. Code Ann. § 36-1-102(1)(A)(i) references "a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s)."

STANDARDS FOR TERMINATION OF PARENTAL RIGHTS

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Terminating a person's parental rights "has the legal effect of reducing the parent to the role of a complete stranger." *In re W.B., IV*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618, *6 (Tenn. Ct. App. Apr. 29, 2005). Pursuant to Tenn. Code Ann. § 36-1-113(l)(1), "[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian."

Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004) (citations omitted). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." *Id.*

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the trial court's findings of fact, our review is de novo with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

ANALYSIS

A party seeking the termination of parental rights must prove two elements by clear and convincing evidence: the existence of one of the statutory grounds for termination and that

termination is in the child's best interest. *In re M.L.P.*, 281 S.W.3d 387, 392 (Tenn. 2009); *In re Valentine*, 79 S.W.3d at 546; Tenn. Code Ann. § 36-1-113(c). In the present case, we have concluded that the petitioners failed to prove the statutory grounds by clear and convincing evidence.⁷

The petition for termination refers to abandonment as defined in Tenn. Code Ann. § 36-1-102,⁸ a statutory provision that contains five different definitions of abandonment. *See* Tenn. Code Ann. § 36-1-102(1)(A). The petition cites the respondent's failure to pay more than token child support or to seek reasonable visitation. Thus, the definition upon which petitioners rely is the definition of abandonment found at Tenn. Code Ann. § 36-1-102(1)(A)(i):

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

The terms "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" are defined to mean "the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(D). "[W]illfully failed to visit" is defined to mean "the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation." Tenn. Code Ann. § 36-1-102(1)(E).

The willfulness of a parent's conduct is an essential element of this statutory definition of abandonment. *In re M.L.P.*, 281 S.W.3d at 392; *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005). Proving that a parent did not visit or pay support is not enough. *In re Audrey S.*, 182 S.W.3d at 863; *In re B.P.C.*, No. M2006-02084-COA-R3-PT, 2007 WL 1159199, *10 (Tenn. Ct. App. Apr. 18, 2007). The element of willfulness has been held to be both a statutory and a constitutional requirement. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). A person acts "willfully" when "he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing." *In re Audrey S.*, 182 S.W.3d at 864. A parent's failure to visit or support is deemed "willful" when "that parent knows he or she has a duty to visit or support, has the ability to visit or support, makes no attempt to visit or support, and has no justifiable excuse for not visiting or supporting the child." *In re Adoption of T.Z.T.*, No. M2007-00273-COA-R3-PT, 2007 WL 3444716, *3 (Tenn. Ct. App. Nov. 15, 2007) (citing *In re Audrey S.*, 182 S.W.3d at 864).

⁷Tenn. R. App. P. 13(b) permits this court to consider issues not raised by the parties in order to prevent injury to the public and prejudice to the judicial process. As this case involves a parent's fundamental constitutional right to the care and custody of his child, we have elected to exercise our discretion to address the alleged ground for termination despite the fact that the respondent's attorney, in a brief containing no citations to caselaw, failed to raise the issue.

⁸The petition erroneously cites "T.C.A. 36-12-102."

The statutory ground upon which the petitioners rely requires that the respondent willfully failed to support and/or visit the child “[f]or a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s).” This four-month period is from November 28, 2007, through March 28, 2008. D.B. and Father testified that he was judicially hospitalized for psychiatric treatment from January 8 or 9, 2008, through September 2008. The petitioners did not dispute this fact. Thus, for approximately three of the four months preceding the filing of the petition, Father was hospitalized for psychiatric treatment. The petitioners emphasized that Father was receiving disability benefits, but there was no proof as to when Father began receiving those benefits or the amount of the benefits. Under these circumstances, we cannot say that the petitioners proved by clear and convincing evidence that Father willfully failed to visit or pay support during the relevant period of time.⁹

In finding Father’s failure to visit or support to be willful, the trial court reasoned that Father “by his own volition, began a lifestyle of drug use,” that “this lifestyle choice totally ignored his own mental condition [and] absolutely ignored the well being of the child,” and that “the culmination of that voluntary choice was a judicial hospitalization that lasted from January to September of this past year [2008].” In the context of determining whether a parent’s unemployment or underemployment is “willful” under the child support guidelines, we have refused to consider incarceration or unemployment as a result of a parent’s wrongful behavior to be enough to establish willfulness. For example, in *Pennington v. Pennington*, the father was incarcerated for drug offenses and lost his medical license. *Pennington*, No. W2000-00568-COA-R3-CV, 2001 WL 277993, * 1 (Tenn. Ct. App. Mar. 14, 2001). We declined to find the father’s unemployment to be willful, stating that he “did not intend to become incarcerated and unemployed when he made the choice to use cocaine.” *Id.* at *4. Similarly, in *Wilson v. Wilson*, the father’s employment as a car salesman was terminated after he was accused of pocketing the proceeds of extended warranty sales he made to customers. *Wilson*, 43 S.W.3d 495, 496 (Tenn. Ct. App. 2000). This court rejected the argument that because the father’s criminal acts were willful and voluntary, he should be considered willfully and voluntarily underemployed. *Id.* at 497. We concluded that willfulness under the guidelines required “an intent on the part of the parent to reduce or terminate his or her income.” *Id.*; see also *State ex rel. C.M. v. L.J.*, No. M2005-02401-COA-R3-JV, 2007 WL 1585170, *2 (Tenn. Ct. App. May 31, 2007); *Johnson v. Johnson*, No. M2003-00866-COA-R3-CV, 2004 WL 2218478, *4 (Tenn. Ct. App. Oct. 1, 2004).

We find the reasoning employed in these cases to be persuasive in the present context and, therefore, decline to accept the trial court’s conclusion that Father willfully failed to pay child support or visit during a period of court-ordered hospitalization. There is no evidence that, when he stopping taking his mental health medications, took illegal drugs, and got into legal trouble, Father

⁹ We note that Tenn Code Ann. § 36-1-102(1)(A)(iv) addresses the situation when a parent is incarcerated at the time when termination proceedings are initiated. Under this subsection, the relevant time period for determining abandonment is the four months preceding the incarceration. Even if Father’s judicial hospitalization would qualify as incarceration, however, the petitioners did not reference the incarceration provisions in their petition and specifically asserted at the hearing that the relevant time was the four months prior to the filing of the petition. Thus, the incarceration subsection is not relevant here.

intended to be judicially hospitalized and impaired in his ability to visit or pay child support. The petitioners failed to carry their burden of proving that Father willfully failed to pay support or visit during the four months preceding the filing of the petition to terminate his parental rights.

CONCLUSION

The decision of the trial court terminating Father's parental rights is reversed. Costs of appeal are assessed against the appellees, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE